

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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ACTAVA TV, INC. ,et al.,

Plaintiffs,

v.

18 CV 6626 (ALC) (KNF)

JOINT STOCK COMPANY "CHANNEL  
ONE RUSSIA WORLDWIDE", et al.,

Defendants.

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New York, N.Y.

May 5, 2020

2:00 p.m.

Before:

HON. KEVIN N. FOX,

Magistrate Judge

APPEARANCES

MOSES & SINGER LP

BY: TOBY MICHAEL JOHN BUTTERFIELD

MICHAEL MORTON ROSENBERG

VALERIA MARIE CASTANARO

-AND-

FOLEY HOAG

BY: DIANA TSUTIEVA

Attorneys for Plaintiffs

DUNNINGTON, BARTHOLOW & MILLER, LLP

Attorneys for Defendants

BY: RAYMOND JAMES DOWD

HARDIN PARISHER ROWLEY

AKBAR AZAM KHAN

1 THE COURT: Before we begin the conference, I wanted  
2 to say to the participants before you speak during the  
3 conference, please identify yourselves so that the court  
4 reporter will know precisely who is speaking.

5 During the conference, if you mention things by name,  
6 please spell the proper names so the court reporter can capture  
7 that accurately. And also be mindful during the conference  
8 that only one person can speak at a time so that the reporter  
9 can capture everything that you want to say clearly.

10 So let's begin. This is Actava TV, Inc., et al. v.  
11 Joint Stock Company "Channel One Russia Worldwide", et al., 18  
12 CR 6626.

13 Will plaintiff's counsel please make your appearance.

14 MR. BUTTERFIELD: This is Toby Butterfield.  
15 Your Honor. I'm appearing for plaintiffs herein, and I believe  
16 my colleagues, also representing plaintiffs, are on the line as  
17 well. Toby Butterfield, T-o-b-y B-u-t-t-e-r-f-i-e-l-d, of  
18 Moses & Singer.

19 MS. CASTANARO: Good afternoon, Judge Fox. This is  
20 Valeria Castanaro, C-a-s-t-a-n-a-r-o.

21 MR. ROSENBERG: Your Honor, this is Michael Rosenberg,  
22 also for the plaintiffs.

23 MS. TSUTIEVA: This is Diana Tsutieva, also for the  
24 plaintiffs, of Foley Hoag, last name spelled T-s-u-t-i-e-v-a.

25 THE COURT: Will defendants' counsel make an

appearance, please.

MR. DOWD: Good afternoon, your Honor. Raymond Dowd of the Dunnington law firm. And with me on the line is --

MR. ROWLEY: This is Hardin Rowley for defendants from Dunnington.

MR. KHAN: And Akbar Khan with the Dunnington law firm on behalf of the defendants.

THE COURT: This conference is to address matters raised by a correspondence beginning with the correspondence appearing at docket entry number 137.

Among the things that were raised in the correspondence was the ability or, rather, authority of defendants' counsel to represent one of the entities, the Channel One entity.

So let's address that matter first, and I'll turn to defense counsel because the plaintiff is challenging whether an authorization that existed, a power of attorney, had expired and therefore Channel One is not any longer represented by counsel. Of course a corporate entity cannot appear pro se. And if it isn't represented by counsel, it defaults in the action.

So what information can be shared to arrest the concern of the plaintiffs that there is no representation presently of Channel One by defense counsel.

MR. DOWD: Your Honor, this is Raymond Dowd. We are

1 in the process of obtaining an updated power of attorney from  
2 Channel One Russia.

3 THE COURT: When will that be affected?

4 MR. DOWD: We expect in the next couple of weeks.  
5 Right now we've had the COVID crisis which has set everybody  
6 back in communications, but we expect to have that forthwith.

7 THE COURT: That gives me some concern because the  
8 plaintiffs wrote about this some time ago, not just yesterday,  
9 and flagged this as an issue. So it appears, based upon what  
10 you're saying, that your power has run out and that Channel One  
11 is not now represented.

12 MR. DOWD: I don't think a formal power of attorney is  
13 necessary in New York to represent a party. Under the doctrine  
14 of apparent authority, an attorney coming in saying that they  
15 have authority is generally enough.

16 We have taken the plaintiffs' concerns under  
17 advisement and are in the process of getting updated powers of  
18 attorney which we've done in the past and had them renewed  
19 without any problems.

20 It just seems it's a rush in procedure to give  
21 time-limited powers and then renew them from time to time. So  
22 I don't think it's a New York requirement that every counsel  
23 have a power of attorney.

24 We do have an underlying retainer agreement that  
25 authorizes us to represent, and we were covered by the power of

1 attorney for all the actions we took up until that time. So I  
2 think under the doctrine of apparent authority that the Court  
3 should be reassured.

4 THE COURT: Of course apparent authority can be  
5 challenged. But let me hear from plaintiffs' counsel on this  
6 score.

7 MR. BUTTERFIELD: Thank you, your Honor. This is Toby  
8 Butterfield. We remain very concerned because of the news we  
9 discovered last year and brought to the Court's attention that  
10 Channel One is in not one but two different litigations with  
11 Kartina Digital GmbH, which is also a defendant.

12 We just about a week ago finally received for the  
13 first time information from defendants' counsel about those  
14 litigations which concern that they are existing in Russia and  
15 in Germany.

16 We're doing our best to try and understand what the  
17 nature of those litigations between the defendants are. But it  
18 seems plain to us that the delay in confirming that Channel One  
19 is still authorizing Mr. Dowd's firm to defend it in this case  
20 must be connected to this under these disputes.

21 The other piece that seems troubling to us is that the  
22 power of attorney that Mr. Dowd's firm provided was, on its  
23 face, not for the defense of this case. It was for the pursuit  
24 of the underlying case, which is an issue in this litigation  
25 against all the defendants.

1 That is not the only problem because the prior power  
2 of attorney was in place for several years but expired at the  
3 end of 2019. Actually, the one that the Dunnington firm sent  
4 to the Court said it was expiring on December 31, 2016.

5 They've shown us in discovery another one that expired  
6 at the end of 2019, but then the extension that Mr. Dowd  
7 referred to only lasted for a couple of months. So since the  
8 end of February, I believe, there has been a lack of apparent  
9 authority. And I'm not hearing from Mr. Dowd that he is in  
10 regular communication with the people who are empowered to  
11 issue this power of attorney.

12 And as Your Honor noticed, this issue has been before  
13 us since long before the appearance of the COVID-19 pandemic  
14 which shut down the regular business operations.

15 So we continue to be very concerned about this and  
16 concerned that we are in the unfortunate position of pursuing  
17 our case without it being clearly demonstrated that Channel One  
18 is represented herein and that Mr. Dowd is authorized to speak  
19 and take action in this case on its behalf which would of  
20 course compromise the integrity of the proceeding.

21 THE COURT: Well, as I indicated earlier in the  
22 conference, if a corporate entity is not represented, it may  
23 find itself in a default situation. So of course I'm not here  
24 to give Channel One any legal advice or any other party to the  
25 action.

1           The power of attorney has lapsed. It hasn't been  
2 renewed. What language a new power will have I guess remains  
3 to be seen, but it puts Channel One in a somewhat precarious  
4 position it seems to me.

5           MR. DOWD: We will communicate that, your Honor.

6           THE COURT: Let me turn to another matter that was  
7 raised, and that is the ability of in-house counsel,  
8 Mr. Lezhnev, and outside counsel, Ms. Tsutieva, to have access  
9 to documents that are exchanged during the pretrial discovery  
10 phase of the action.

11           The protective order that the parties negotiated and  
12 presented to the Court provides for in-house counsel and  
13 outside counsel to review documents. That's clear. And of  
14 course anyone getting access to the confidential documents  
15 exchanged must safeguard them and ensure that they're used for  
16 this litigation.

17           So if that is the case, as it appears from a plain  
18 reading of the protective order, that both in-house and outside  
19 counsel can look at documents, I was somewhat curious about why  
20 the defendants, having negotiated such language for a  
21 protective order, seem now to balk at having these two  
22 attorneys be privy to materials exchanged.

23           Mr. Dowd?

24           MR. DOWD: Your Honor, if I may defer to Mr. Rowley on  
25 this point.

1 THE COURT: Very well.

2 MR. ROWLEY: This is Hardin Rowley. Judge Fox, you  
3 made a good point about the negotiations of the protective  
4 order. I negotiated those terms with Mr. Butterfield, and he  
5 did not disclose Ms. Tsutieva's involvement.

6 If we had known that, we would have asked for a  
7 carve-out for her in particular. That's the main issue. We  
8 only learned about her in their privilege log that was produced  
9 in December 2019.

10 I negotiated the protective order in May 2019. And  
11 her proximity to Mr. Tsoutiev, the principal of these entities  
12 and one of the plaintiffs, is a concern of ours. And we  
13 actually proposed amending the protective order to plaintiffs'  
14 to create sort of tiers of access, and we haven't received a  
15 response.

16 THE COURT: During your negotiation, did you ask  
17 plaintiffs' counsel to identify every attorney who would be  
18 covered by the agreement?

19 MR. ROWLEY: No. I relied on his representations.

20 THE COURT: Did he represent or present to you a list  
21 of every attorney who would be representing the plaintiffs in  
22 this action?

23 MR. ROWLEY: No. I relied on who had filed a notice  
24 of appearance and his firm generally.

25 THE COURT: All right. Mr. Butterfield, do you want



1 to be heard?

2 MR. BUTTERFIELD: Yes, your Honor. This is a baseless  
3 accusation against Ms. Tsutieva, to suggest that she would  
4 compromise the confidentiality of information that she gets  
5 subject to the protective order.

6 She had not entered a notice of appearance at the time  
7 of the negotiation of the protective order, and that doesn't  
8 make any difference really as to whether -- the plaintiffs are  
9 entitled to select counsel of their choosing.

10 She's counsel at a very well-known firm in Washington  
11 D.C. There is no support for the suggestion that she would  
12 somehow violate the protective order. There is no accusation  
13 that she has violated the protective order. So I strongly  
14 object to the other side, the defendants' counsel, trying to  
15 prevent us from acting in accordance with the protective order.

16 Finally, this idea that these materials are somehow  
17 competitively sensitive doesn't make any sense for reasons  
18 we've exchanged in written correspondence with the defendants'  
19 counsel, and we're going to challenge the attorneys' eyes only  
20 designation.

21 It doesn't make sense either that there is any  
22 competitive threat because Actava TV is, as we all know, no  
23 longer in this business. So that's my position, your Honor.

24 The other accusations or veiled suggestions, most of  
25 which I'm not going to address because I think they're a little

1 more wild-eyed, an exception to privilege, things like that,  
2 ridiculous things. So I'm going to rest on that, your Honor,  
3 and not spend more time on it.

4 THE COURT: Do you want to be heard further?

5 MR. ROWLEY: Just one point. We produced to  
6 plaintiffs a trademark registration filed by Mr. Lezhnez in  
7 2019 that said they were still in business doing this. So I  
8 don't know what is Mr. Butterfield's basis for that statement.

9 MR. BUTTERFIELD: The whole premise of this lawsuit is  
10 that the company is no longer streaming and its business has  
11 been destroyed.

12 THE COURT: Nothing in the correspondence suggested to  
13 me that there has been any attempt by plaintiffs' counsel,  
14 including Ms. Tsutieva, to breach the confidentiality of  
15 anything that's been exchanged.

16 The parties negotiated the terms of the protective  
17 order that was presented to me. There is no indication in any  
18 of the correspondence or anything that has been said during  
19 this conference that suggests that she is not providing legal  
20 services; that she's doing work other than that in some  
21 capacity other than as counsel.

22 So the privilege log stands as it is. It allows both  
23 the in-house and outside counsel to review materials, and I see  
24 no reason to deviate from that at this juncture.

25 Let me turn now to the matter of the privilege log or

logs. There are two for the Kartina entity and one for the Channel entity. Exemplars of materials that are the subject of the controversy over the privilege log provided by the defendants were sent to me for in-camera review. They have been reviewed.

The types of documents were placed into three categories: Category A, the Kartina log covering a period March 2016 to 2017. Those are communications involving defense counsel; category B, also a Kartina log covering a period January 2018 through September 2018; and the last category, category C, a Channel log of various communications.

With respect to the category A documents, based on the review, the in-camera review, I see no reason to require those documents to be disclosed. The privilege that was asserted, attorney-client privilege, appears to cover those materials. So that is why I conclude there is no reason to disclose them.

With respect to the category B documents, those communications appear to address bills or invoices for legal services. And such invoices and bills are not covered by the attorney-client privilege. The Second Circuit has made that clear in several different cases. So those materials can be disclosed. They're not protected by privilege.

The category C materials, these are Channel log communications. The in-camera review persuades me that they are covered by attorney-client privilege and need not be

1 disclosed.

2 MR. DOWD: Your Honor, may I be heard on category B?  
3 This is Raymond Dowd.

4 THE COURT: Yes.

5 MR. DOWD: I would point out to your Honor  
6 respectfully that these emails cover settlement negotiations.  
7 It is not just a discussion of legal bills or just some sort  
8 of -- this has to do with strategy and communications involving  
9 negotiating a settlement. And I would ask your Honor  
10 respectfully if you could please reconsider.

11 THE COURT: Unless I'm mistaken, I thought that those  
12 were captured in another category and that the exemplars that I  
13 reviewed did not deal with any strategy and potential  
14 litigation at all.

15 It sounds like it's only on things you might be paid  
16 for. I recognize that there were materials that did speak to  
17 settlement and strategy, and those I did not direct to be  
18 disclosed.

19 MR. DOWD: Your Honor, I withdraw my comment. I had  
20 misspoken. I agree with your assessment. I apologize.

21 THE COURT: No problem.

22 MR. DOWD: I confused two different things.

23 THE COURT: Not a problem at all. I think those are  
24 all the matters that were presented to me in the correspondence  
25 that I wanted to address with you today. If I overlooked

1 something, let me know now. Otherwise, that will conclude our  
2 business today.

3 MR. DOWD: Thank you, your Honor.

4 MR. BUTTERFIELD: Your Honor, the issue of the  
5 categories A and C, I'm a little unclear whether your Honor's  
6 conclusion is based in part on the claims by the defendants  
7 that there is a common interest privilege that allows them to  
8 continue to maintain the privilege, although Kartina and  
9 Channel One are party to the communications. And if that's the  
10 case, I would like to be heard.

11 THE COURT: That is the case, in part.

12 MR. BUTTERFIELD: The problem that we have, your  
13 Honor, is that we've been learning piecemeal, because of the  
14 defendants' refusal to provide any discovery about the dispute  
15 between these different defendants, as to what that dispute  
16 concerns.

17 But what we have discovered is that Channel One has  
18 been claiming for more than a year that Kartina itself is a  
19 pirate who is sending out unauthorized streaming video of  
20 Channel One's to its subscribers.

21 The dispute appears to be based in part on a financial  
22 dispute, an argument by Channel One that Kartina isn't paying  
23 its bills for streaming that content. And therefore, that's  
24 the reason why these cases exist.

25 And in that situation, we don't believe that the

1 common interest privilege is applicable. And certainly from  
2 the time that that dispute arose, the common interest privilege  
3 can't survive when the parties are in litigation with each  
4 other.

5 The very recent disclosure of any of the details of  
6 these cases mean that we weren't in a position to provide more  
7 information to you, your Honor. But we have got some publicly  
8 available reports, as well as the defendants' interrogatory  
9 responses.

10 And for that reason, although it may have appeared,  
11 based on the selection of particular exemplars provided to you  
12 by defendants' counsel, that there is a common interest  
13 privilege, we believe, if it existed, to the extent it existed,  
14 it's been destroyed as demonstrated even by the terms of the  
15 engagement letter that the Dunnington firm provided to  
16 your Honor which warned Kartina at the outset that if there  
17 were additional proceedings under which Dunnington appeared for  
18 and represented Kartina, an additional engagement letter, a  
19 joint defense, or prosecution agreement with any counterparties  
20 might be required -- as far as we're aware, there are no such  
21 documents -- and that if there was a conflict of interest  
22 between the parties, then Dunnington would no longer be able to  
23 continue to act for everybody.

24 And despite the fact that these disputes do exist,  
25 Dunnington has continued to represent them. So we would like

1 an opportunity to put that evidence before your Honor.

2 We don't want to burden your Honor with a lot more  
3 discovery disputes. There have been enough already. But these  
4 compilations we believe go to the heart of the issue that we  
5 are seeking redress for.

6 The communications must not be just between the  
7 represented parties, but they must be in furtherance of the  
8 joint defense. And we've got nothing to suggest that any of  
9 these parties explicitly retained Dunnington to defend this  
10 case. And now we've got the doubt as to whether Channel One,  
11 if it even authorized it to act, continues to do so.

12 So we'd like to put a targeted motion before  
13 your Honor explaining and showing the details that we think are  
14 very troubling as to the dispute between Channel One and  
15 Kartina and explain why that shows that whatever common  
16 interest defense privilege might have existed for  
17 communications with counsel in furtherance of the defense of  
18 this case previously, that is no longer the case.

19 THE COURT: In the correspondence that came to me, you  
20 did raise this matter, not necessarily in the detail that you  
21 just did and that you suggest you might, if given an  
22 opportunity to submit more on this particular point.

23 So it was a consideration of mine when I reviewed the  
24 exemplars, the plaintiffs' position that there is now some  
25 tension between Kartina and Channel One and other defendants

1 that may have to be considered in determining whether the  
2 attorney-client privilege protected any of the attorneys that  
3 were referenced in the log.

4 But let me hear from defense counsel.

5 MR. DOWD: Yes, your Honor. This is Raymond Dowd.  
6 Basically there has been a dispute that arose after the  
7 termination of the license agreement which postdated all of the  
8 events that we're discussing here.

9 So we think that if this were teed up in a joint  
10 discovery letter where Mr. Butterfield put his side together  
11 and we put our side together, it would tee it up for your Honor  
12 to rule on and we could respond in detail to these allegations.

13 THE COURT: All right.

14 MR. BUTTERFIELD: I thought we'd gone through that  
15 process. But if that's what your Honor wants to do, we can do  
16 that. We thought that that was the point of our initial  
17 letter.

18 We'd hoped that we might be able to are resolve these  
19 issues or that the dispute between the parties, between Channel  
20 One and Kartina, might somehow get resolved or that Channel One  
21 might reaffirm its authorization to the Dunnington firm to act  
22 herein.

23 But those things haven't happened, and now we're  
24 coming up on depositions. So we'd really like to get a proper  
25 ruling, your Honor. I think another premotion letter is not



1 necessarily going to provide your Honor with a record that you  
2 would want to have in order to see the evidence, the enclosures  
3 and the discovery actions that we have now finally obtained  
4 from Mr. Dowd that describe how broadly this dispute between  
5 the defendants goes.

6 THE COURT: As I indicated, I was aware of the  
7 plaintiffs' position from the correspondence that came, and I  
8 considered that in determining whether the privilege existed or  
9 did not exist. And I came out as I did and explained to you  
10 moments ago my position on what should be disclosed and what  
11 should not be based on the privilege asserted by the  
12 defendants.

13 I'm not interested -- as Mr. Butterfield suggested, I  
14 might not be, I'm not interested in having the parties churn  
15 out a lot of paper covering turf that has already been covered.

16 So I'm not inclined to receive another writing because  
17 I've considered the position of the plaintiff as set forth  
18 already in the correspondence in analyzing the dispute over  
19 whether privilege existed and materials should be properly  
20 withheld by the defendants.

21 So I have given you my view on that, having considered  
22 the plaintiffs' argument that an existing controversy or a new  
23 controversy involving Kartina means that there isn't the  
24 alignment of interest and so forth.

25 MR. BUTTERFIELD: Your Honor, if I may. This is

1 Mr. Butterfield again. The information that we've received  
2 since we wrote that letter suggests that the conflict is  
3 sufficiently serious so that it does destroy the common  
4 interest privilege.

5 I am just seeking an opportunity to put a very  
6 targeted set of papers before your Honor to explain that and to  
7 provide more than we were able to in a very short premotion  
8 letter on the law that says that once you're representing  
9 parties who are in litigation with each other, that conflict of  
10 interest is not waivable and the common interest provision  
11 cannot apply after that dispute has arisen.

12 THE COURT: All right. I'll allow you to submit a  
13 writing to me. Be mindful of my individual rules of practice  
14 with respect to discovery dispute writings.

15 When shall I expect to receive the writing from the  
16 parties?

17 MR. BUTTERFIELD: Next week, your Honor, if that's  
18 okay.

19 THE COURT: That's fine by me. All right.  
20 Anything else from either party before I release you  
21 today?

22 MR. DOWD: No, your Honor.

23 MR. BUTTERFIELD: No, your Honor.

24 THE COURT: All right. Thank you very much. Good  
25 day.